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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 917

JOSEPH ELKANICH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner Joseph Elkanich respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause January 13, 1964.

OPINIONS BELOW.

No opinion was rendered in the District Court. The opinion of the Court of Appeals affirming the judg-

ment of the District Court is printed in Appendix A hereto.

JURISDICTION.

The judgment of the Court of Appeals sought to be reviewed was dated and entered January 13, 1964, and a copy thereof is printed in Appendix B hereto. A petition for rehearing was denied February 18, 1964, and an order made, under Rule 26, staying issuance of the certified judgment of the court to and including March 17, 1964. Jurisdiction of this court is invoked under 28 U.S.C., § 1254 (1).

QUESTION PRESENTED.

Whether petitioner's conviction of violating the narcotic laws was the product of unlawful search and seizure denounced by the Fourth Amendment.

STATUTE INVOLVED.

United States Constitution, Amendment 4:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE.

Petitioner was convicted on an indictment charging him with three sales of heroin in July of 1962 at San Francisco. 1 T 1-2. Each sale was directly made to Leonard Lang, an undercover Federal Narcotic Agent, by one Albert Rios, a narcotic addict and "pusher". Each purchase was made with "marked" money or "official advance funds", namely, the serial numbers of the bills used in the purchase had been prerecorded. The first sale was made July 13, 1962, the second July 18, 1962, and the third July 19, 1962.

Rios was arrested on his way home after making the third sale and at that time marked bills amounting to $200 were found on the floor of the automobile he was driving. 1 T. 71, 2 T. 177, 190-191.

Undercover agent Lang, posing as a narcotic buyer and user (2 T. 272) first met Rios on July 13, 1962, at the home of Edward Teshera, an informant, a narcotic user, and a narcotic "pusher". 2 T. 234-236, 246-248, 3 T. 270-272. On that date (July 13) he paid Rios $700 for an ounce of heroin. 2 T. 20. He received the heroin while sitting in an automobile which Rios had parked on Larkin Street in San Francisco across the street from a Hotel Marlow where Rios had apparently obtained the heroin after a brief absence from the automobile. 2 T. 19-20, 29.

At the time of this sale and delivery the Hotel Marlow was operated by a Mrs. Byrd. 2 T. 95-96. The hotel register there showed that petitioner Joseph Elkanich under his own name was registered as a

guest on July 13, 1962. 1 T. 59-60. The records of the Federal Bureau of Narcotics then showed that petitioner Joseph Elkanich, a seaman, had been suspected of trafficking in narcotics on three occasions and his photograph was in the files. 1 T. 59-60. And the records of the telephone company showed that petitioner Joseph Elkanich then occupied premises and maintained a telephone at 345 Hyde Street, San Francisco. 1 T. 60-61. The agents made no effort to resort to such sources of information or coordinate such information before Rios was arrested on July 19, 1962, or to place petitioner under surveillance.

In the interval agent Lang made two additional buys of narcotics from Rios and received deliveries thereof. One occurred July 18, 1962, and delivery of the narcotics was made to Lang in a phone booth of a supermarket. 1 T. 32-34. The other occurred July 19, 1962. Delivery of the narcotics was made to Lang while he was sitting in the Rios automobile parked on a public street and to which Rios had returned after an absence of about 30 minues. 1 T. 36-38. The Hotel Marlow was in no way involved.

Search and seizure by narcotic agents without search warrant or arrest warrant occurred July 20, 1962, at premises jointly occupied by Mary Egan and petitioner in Apartment 1, 345 Hyde Street, San Francisco. Six agents, including agent Lang, participated. 1 T. 40, 64-75; 2 T. 127-147; 2 T. 148-152; 2 T. 160-172; 2 T. 173-189; 2 T. 129, 164. Agent Lang was one of the first to arrive and that was around 6 p.m. of

July 20, 1962. 2 T. 40. A note addressed to the "Telephone repairman" was appended to the buzzer on the front of the apartment. It stated: Telephone repairman: Buzzer for Apartment 1 does not work. Please tap on window". One of the agents accepted this invitation extended to the telephone repairman and tapped on the window. When Mary Egan responded to the tap and opened the door agent Lang and another agent entered the premises, placed petitioner under arrest, handcuffed him, and searched the premises. 1 T. 40, 2 T. 155.

No narcotics were found by the agents. But upon search of the premises the agents found and seized $1550 in bills identifiable as marked or prerecorded bills that Lang had paid Rios in the purchase of narcotics, as follows: $100 on July 13, 1962, $450 on July 18, 1962, and $1000 on July 19, 1962. The agents also testified respecting admissions elicited from appellant while under arrest on the premises.

Seasonable motions to suppress evidence as to what the agents found and heard at the time of the search and seizure were made, and the motions were denied. Timely objections to the admission of such evidence were also made. 4 T. 334-336. And at the conclusion of the case petitioner's motion for judgment of acquittal incorporating grounds urged on motions to suppress was denied. 4 T. 340-341.

REASON FOR GRANTING THE WRIT.

(a) THE COURT OF APPEALS HAD DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Petitioner respectfully urges that affirmance of the judgment of conviction by the Court of Appeals is in conflict with the decisions of this court interpreting the Fourth Amendment in *Ker v. State of California,* 374 U.S. 23, *Wong Sun v. United States,* 371 U.S. 471, and *Draper v. United States,* 358 U.S. 307.

Each of those cases, as petitioner conceives it, is committed to the rule that in cases like the present probable cause for arrest must be established on the basis of information obtained from previously known or reliable informers. There was no such informer in this case according to the evidence. There was no consent by petitioner for the agents to search the apartment he jointly occupied with Mary Egan until after their entry and until after they had informed him that he was under arrest and had handcuffed him. It follows then, from the cited cases, that the search and seizure involved were "fruit of the poisonous tree," and that the search and seizure growing out of the unlawful entry invaded the indefeasible right of personal liberty and private property of petitioner and violated the Fourth Amendment.

Each of those cases, as petitioner conceives it, holds that an arrest with or without a warrant must stand upon firmer ground than mere suspicion; that "probable cause" for arrest must exist; that the arresting officer could have procured an arrest warrant on the

information which impelled them to act; and that only identification by a reliable informant may constitute probable cause for arresting a suspect; that an officer may not act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant; that a search invalid in its inception is not validated by what it turns up; and that unlawful search bars from evidence declarations made by an accused during or as a direct result of unlawful invasions.

On the record here, neither narcotic agent Lang nor any other narcotic agent made any substantial effort to obtain a search warrant or an arrest warrant before invading appellant's apartment on the evening of July 20, 1962. They turned their backs on information and sources of information until a moment arrived when it was too late to obtain any warrant from the proper officer. Moreover, it is apparent that the agents could not have obtained a search warrant for they were in no position to particularize the description of the property to be seized.

And so far as arrest warrant was concerned it is quite obvious that if Rios had been arrested on July 20, 1962, when he returned to his automobile from the Hotel Marlow, all that agent Lang claimed to have belatedly discovered on July 20, 1962, would have been revealed. The record here is very plain that petitioner lived and worked under his own name at all times. There was no semblance of a case until after the unlawful search and seizure.

The decision of the Court of Appeals in this case cannot survive an application of the rules declared and enforced in the cases cited.

CONCLUSION.

For the foregoing reasons it is therefore respectfully submitted that a writ of certiorari should be granted.

Dated, San Francisco, California,
March 9, 1964.

Respectfully submitted,
SOL A. ABRAMS,
Counsel for Petitioner.

JOHN J. FAHEY,
HERBERT CHAMBERLIN,
Of Counsel.

(Appendices A and B Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

JOSEPH ELKANICH, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 18,702 Jan. 13, 1964

Appeal from the United States District Court for the Northern District of California Southern Division

Before: CHAMBERS and HAMLEY, Circuit Judges, and MURRAY, District Judge

MURRAY, District Judge:

Appellant appeals his conviction, after a jury trial, on three counts of fraudulently and knowingly selling and concealing and facilitating the sale and concealment of heroin, in violation of 21 U.S.C. § 174. Jurisdiction of this appeal is conferred on this court by 28 U.S.C. §§ 1291 and 1294.

Appellant was arrested by federal narcotic agents without a warrant on July 20, 1962, in an apartment on Hyde Street, San Francisco. Found and seized in the search of the apartment which followed the arrest were $1,550 of official advance funds previously used in the purchase of heroin on July 13, 18 and 19, 1962.

from one Albert Rios, and a plastic bag enclosed in a large manila envelope. This money, plastic bag and envelope were received in evidence at the trial over appellant's timely objection, after his pre-trial motion to suppress made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure had been denied.

The sole question presented by this appeal is whether the arresting officers had "probable cause" within the meaning of the Fourth Amendment to the Constitution,[1] and "reasonable grounds" within the meaning of § 104(a) of the Narcotics Control Act of 1956, 70 Stat. 570, 26 U.S.C. (Supp. V), § 7607[2] to arrest appellant without a warrant, for if the arrest were lawful, the search and seizure made in connection with the arrest were likewise lawful, and the evidence which was the product of the arrest and the search and seizure was properly admitted. Draper v. United States, 358 U. S. 307, 310, 314. "Probable cause" as used in the Fourth Amendment, and "reasonable grounds" as used in § 104(a) of the Narcotics

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[1]The Fourth Amendment to the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2]"The Commissioner . . . and agents, of the Bureau of Narcotics . . . may—

"(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Control Act, are substantial equivalents of the same meaning. Draper v. United States, supra; United States v. Walker, 246 F.2d 519, 526.

To resolve this problem a somewhat detailed statement of the circumstances surrounding the three narcotic sales charged in the indictment is necessary. All three sales were made by one Albert Rios, a narcotic addict, to one Leonard Lang, an undercover Federal Narcotic Agent. In each instance the purchase was made with "official advance funds", that is, money supplied by the government in currency, the serial numbers of which had been recorded on a money list.

The first sale was made July 13, 1962. At 9:30 that evening, pursuant to previous arrangements between them, Lang met Rios at a telephone booth on the highway near a shopping center at Pacifica, a suburb of San Francisco. They drove in Rios' car to San Francisco where Rios parked in the 600 block on Larkin Street, across the street from the Marlow Hotel or Apartments. At that time and place, in Rios' car, Lang gave Rios $700 in official advance funds for the purchase of one ounce of heroin. Rios left the car, crossed the street and entered the Marlow Hotel. He remained in the hotel for about 30 minutes, and then returned and reentered the automobile and handed Lang a small brown paper sack containing a plastic envelope with heroin inside. They returned to Pacifica where Lang picked up his car and drove back to San Francisco with the heroin.

The second sale was made July 18, 1962. On that date, at about 3 o'clock P.M., Lang met Rios at a bowling alley in the 2900 block on Mission Street in San Francisco, and from there they drove to a bar at 11th and Mission Streets, where, at approximately 4:15 P.M., Lang delivered to Rios $600 in official advance funds, and Rios departed. Lang remained in the bar for about an hour and a half until he received a telephone call from Rios, and then he went to a parking lot of the Safeway Store at Market and Duboce Streets, where he met Rios again. They entered the Safeway Store, and at a phone booth in the store Rios delivered to Lang a paper sack containing a plastic envelope with heroin inside.

The third sale was on July 19, 1962. Lang again met Rios at the bowling alley and they arranged a subsequent meeting. At 4:00 P.M. that same day, Rios picked up Lang in his car and drove to the vicinity of 14th and Belcher Streets in San Francisco, where Rios parked his car. Lang then gave Rios $1,200 in official advance funds, and Rios left the car and disappeared. He returned to the car in about 30 minutes and delivered to Lang a brown paper sack containing 4 plastic envelopes with heroin inside. Lang then picked up his own car and returned to his office, and Rios was arrested by other Federal Narcotic Agents on his way home to Pacifica, at about 6 P.M. on July 19, 1962, at which time, $200 of the official advance funds was found in his car.

At the time of his arrest on the evening of July 19th, Rios had in his possession two keys and an ad-

dress book. When questioned as to his source of supply of heroin at that time, Rios stated his source was a Chinese seaman named "Charlie", but that he had no address or telephone number for this person. When questioned by agent Lang again on the afternoon of July 20, the day following his arrest, Rios informed Lang that the keys found on his person were to room 30 in the Marlow Hotel where he had met "Charlie" the Chinese seaman on the evening of July 13th and purchased the heroin he sold to Lang on that date.

On checking at the hotel after receiving this information Lang was informed by the landlady that she had been managing the hotel for three months and that no Chinese had been in the hotel during that time to her knowledge. Upon examining the rent receipts she informed Lang that room No. 30 had been rented on July 13, 1962 to a "Slovakian-looking fellow" whom she described in detail and she furnished a rent receipt indicating that the name of the occupant of room 30 on the evening of July 13th was Joseph Elkanich. She further advised Lang the room had not been slept in that night and she had found two empty beer cans when she cleaned the room.

Armed with this information Lang returned to his office and checked Bureau of Narcotics files and discovered four or five memorandum reports dating back to 1951 relating to a Joseph Elkanich, a seaman who met the physical description of appellant furnished by the landlady of the Marlow Hotel. Several of the reports contained information from reliable inform-

ants, as well as reports of a Federal Narcotics Agent who had contacted Elkanich in 1953 or 1954 in an undercover capacity, reflecting that Elkanich was suspected of being a seaman smuggler of heroin from the Orient.

The file also indicated that Elkanich had been incarcerated at McNeil Island in 1960, so Agent Lang went to the San Francisco Police Department seeking a photograph. He encountered some delay in obtaining the photographs at the Police Department, and it was not until approximately 5 o'clock P.M. that he received the pictures and returned to the Marlow Hotel, where the landlady positively identified the photograph of appellant as the man who rented Room 30 on the evening of July 30th.

Since there was no listing in the telephone directory for a Joseph Elkanich, Agent Lang called the Telephone Company and ascertained that appellant had an unlisted telephone number, and that the address for the unlisted number was 345 Hyde Street, Apartment No. 1. Lang then determined upon checking that appellant's unlisted telephone number was contained in the address book taken from Albert Rios at the time of his arrest.

By the time all this information had been gathered, it was late afternoon or early evening, and Agent Lang attempted to contact a United States Commissioner in order to obtain a warrant for Elkanich, but was unable to locate the Commissioner. Realizing that Rios had been attempting to conceal the true identity of his source of supply and that Rios had access to

a telephone at the County Jail with which to warn Elkanich, and feeling that he had probable cause and reasonable grounds to arrest Elkanich, Lang with two fellow narcotic agents proceeded to Elkanich's apartment and made the arrest, and incidental thereto conducted the search and seizure.

Speaking of probable cause sufficient to justify an arrest without a warrant, the Supreme Court, in Draper v. United States, supra, stated at page 313 of the U. S. Reports:

> "'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act.' Brinegar v. United States, supra, at 175. Probable cause exists where 'the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162."

We believe here that the facts and circumstances within Agent Lang's knowledge and of which he had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution to conclude that an offense had been committed and that appellant was involved in it. He knew that on three occasions he had purchased heroin from Rios. Considering the manner in which the sales

were conducted, i.e. first, the payment of the money to Rios, then Rios disappearing to return later and make delivery of the narcotics, it was a reasonable assumption that he was contacting someone to purchase the narcotics which he in turn sold to Agent Lang. This conclusion was fortified when, on his arrest almost immediately after the last sale, Rios had in his possession only $200 of the $1200 paid him by Agent Lang just shortly prior thereto. Furthermore, Rios advised Lang during the course of their dealings and prior to his arrest that he had a source of supply who was a seaman named Charlie, and as pointed out, the method in which the sales were transacted confirmed the fact that Rios was obtaining the narcotics from someone each time he made a sale. All of these circumstances furnished Agent Lang abundant probable cause and reasonable ground for believing that narcotic offenses had been committed by someone in addition to Rios.

The remaining question for consideration, then, is whether the facts and circumstances within the officer's knowledge pointed with sufficient probability to appellant as being Rios' source of supply to justify his arrest without a warrant. As pointed out, Agent Lang knew, or reasonably believed, that a transfer of narcotics to Rios from his supplier occurred the evening of July 13th in room 30 of the Marlow Hotel. The keys to this room were in Rios' possession when he was arrested, and he informed Agent Lang he had purchased the heroin from a Chinese named Charlie in that room on that occasion. However, investigation

at the hotel disclosed that no Chinese had been in the hotel at or about the time in question. When that investigation ultimately revealed that appellant was the person who rented room 30 the evening of July 13th, and it was then discovered that appellant had a record with the Bureau of Narcotics dating back a number of years as a suspected smuggler of heroin, the same narcotics involved in these sales, the officer had probable cause and reasonable grounds for believing appellant was the one involved with Rios in the narcotic transactions under investigation. Possession by Rios in his address book of appellant's unlisted telephone number is also significant, considered in the light of the fact that from the manner in which each of the sales from Rios to Lang was transacted, it was a reasonable assumption that Rios was a middleman who had to call his supplier to arrange for a supply of heroin after Lang had placed his order and paid the money.

Bearing in mind that while "an arrest with or without a warrant must stand upon firmer ground than mere suspicion", but "the arresting officer need not have in hand evidence which would suffice to convict", Wong Sun v. United States, 371 U. S. 471, 479, we hold the officers, under all the circumstances of this case taken together, had probable cause and reasonable grounds for arresting appellant without a warrant, and that the evidence obtained as a result of said arrest and related search was properly admitted, and the judgment is affirmed.

(Endorsed) Opinion Filed Jan. 13, 1964.

Frank H. Schmid, Clerk.

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Appendix B

United States Court of Appeals
For the Ninth Circuit

JOSEPH ELKANICH, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 18702

Appeal from the United States District Court for the Northern District of California, Southern Division.

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 13, 1964.